

A Model for the ‘War Against Terrorism’? Military Intervention in Northern Ireland and the 1970 Falls Curfew

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This paper questions the claim that British militarized security strategy in Northern Ireland offers a model for the global ‘war against terrorism’ by exploring the critically important (though neglected) ‘Falls Curfew’ episode. Part one explores the relationship between law, legitimacy, and the role of the military in democracies experiencing violent conflict. Part two examines the operationalization of the law on military intervention during the curfew, drawing on archival material and employing empirical studies. Part three draws overall conclusions, relating the contribution that the curfew made to the escalation of the conflict to its operational aspects and legal underpinnings. Failings are identified, and some general lessons drawn out about the dangers of a ‘war’ model in complex and violent political disorders.

Official British discourse in the wake of the 9/11 atrocities presents militarized security strategy in Northern Ireland as a model for prosecuting the global ‘war against terrorism’.¹ The claim begs an obvious rejoinder: if the Army’s role in Northern Ireland provides an example to be followed,

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1 See, for instance, ‘Britain to Brief US on Experience with IRA’ *Daily Telegraph*, 8 November 2001, and ‘Britain Shares its Lessons of Terrorism’ *Washington Times*, 14 February 2002.

why did the violence escalate so markedly after the initial (1969) military deployment, and why did the conflict continue for a further quarter century? Clearly, there are lessons to be learned from the Army's use of emergency powers in Northern Ireland, but claims that it provides a successful model of response to political violence and terrorism are highly contestable.

Simplistic comparisons between conflict situations are to be avoided, but there are elements in the post-9/11 United States response, at home and abroad, that bear uncomfortable similarities to early British techniques in Northern Ireland. The correspondence is most striking in the American employment of prolonged detention without trial of suspect foreigners, and in the increased role for the military, evidenced by provision for trial by military commission and in suggestions for loosening the restrictions on the Army imposed by the 1878 Posse Comitatus Act.² Parallels from further afield emerge from the invasions of Afghanistan and Iraq: the controversial treatment of the Guantanamo Bay detainees, and the killing of civilians in contested demonstrations and in checkpoint incidents in Iraq.³

For states such as the United Kingdom and the United States of America, with a commitment to democratic values and the 'rule of law', reliance upon military force presents formidable, multi-layered problems. This is true overseas, as the debates on the legality of the use of force against Iraq⁴ and on the lawfulness of actions taken during the subsequent occupation illustrate,⁵ particularly where 'democratization' is advanced as a ground for intervention.⁶ Where the military is employed not abroad but at home on 'internal security duties', the ideological element of the problem comes into particularly sharp focus. The democratic state is a limited state, in which conceptions of law, legitimacy, and the subordination of the military to a

2 See N. Katyal and L. Tribe, 'Waging War, Deciding Guilt: Trying the Military Tribunals' (2002) 111 *Yale Law J.* 1259; C. Evans, 'Terrorism on Trial: The President's Constitutional Authority to Order the Prosecution of Suspected Terrorists by Military Commission' (2002) 51 *Duke Law J.* 1831; J. Fitzpatrick, 'Jurisdiction of Military Commissions and the Ambiguous War on Terrorism' (2002) 96 *Am. J. of International Law* 345; H. Hongju Koh, 'The Case Against Military Commissions' (2002) 96 *Am. J. of International Law* 337; D.A. Mundis, 'The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts' (2002) 96 *Am. J. of International Law* 320.

3 'Iraqi Civilians Killed at Checkpoints' *Guardian*, 1 April 2003. 'US Military Chiefs Express Regret Over Civilian Deaths' *New York Times*, 2 April 2003.

4 'Lawyers Split Over Right to Use Force' *Daily Telegraph*, 11 March 2003. M. Happold, 'The Legal Case for War with Iraq' *Guardian*, 13 March 2003. 'Attorney General: War is Legal' *Guardian*, 17 March 2003.

5 'US "will adhere" to Geneva Convention' *Daily Telegraph*, 2 April 2003. 'Occupation of Iraq Illegal, Blair told' *The Guardian*, 22 May 2003. 'Blair Denies Occupation is Illegal' *Daily Telegraph*, 23 May 2003.

6 'Blair promises "brighter and better" Iraq' *Guardian*, 19 March 2003. 'The transition from dictatorship to democracy will take time, but it is worth every effort . . . Then we will leave, and we will leave behind a free Iraq.' Extract from a speech given by George W. Bush aboard the USS Abraham Lincoln, 2 May 2003.

framework of democratic governance are intimately linked. The employment of the army to combat non-conventional challenges presented by political violence, terrorism, and public order threats raises a number of thorny issues. Who (if anyone) controls the military, particularly if a 'war' model is adopted? What limits should law prescribe, in terms both of control and of substantive action? Given the ideological underpinnings of the democratic state, what are the consequences for its legitimation mechanisms, of a military departure from 'democratic' standards? And what implications might such departures have for the escalation or resolution of the conflict?

This paper interrogates claims for the export value of the Northern Ireland model by an exploration of a critically important (though neglected) episode that encapsulates many of the legal dilemmas of the militarization phase of the conflict (1969-76). In July 1970, in a deteriorating public order situation, the Army (using helicopter-borne loudspeakers), imposed a weekend-long curfew, without statutory authority, on Belfast's Lower Falls district, barring movement within and from the area. Immediately prior to and during the 'Falls Curfew', the Army killed four people, widely believed to be innocent civilians, in the affected area, fired 1,500 live rounds and large numbers of CS gas cartridges, conducted mass house searches, and made 337 arrests.⁷

What made the event of particular legal significance was that this resurrection of non-statutory military powers ran directly counter to the generalized assumption that the development of democratic and constitutional norms in the twentieth century had made such powers obsolete.⁸ Commentators are generally agreed that the curfew, in practical terms, was radically counter-productive. Along with the introduction of internment without trial (1971) and the Bloody Sunday killings (1972), it played a major role in reversing the previously good relations between the Army and Northern Ireland nationalists. But whereas the two later events have attracted intense legal analysis, the curfew has been under-researched.⁹ This is surprising, as the absence of a statutory basis for its imposition meant that its claimed doctrinal foundation lay in the Diceyan view of the common law which located military responses to riot and insurrection on the same sliding

7 For military-based accounts see D. Hamill, *Pig in the Middle: The Army in Northern Ireland 1969-1984* (1985) 36-9, and D. Barzilay, *The British Army in Ulster Vol. 1* (1977) 11-16. For a swingeing critique of Army behaviour, see S. Ó Fearghail, *Law(?) and Orders: The Belfast 'Curfew' of 3-5 July 1970* (1970). On deaths during the curfew, see University of Ulster's authoritative CAIN website <<http://cain.ulst.ac.uk>>, last visited 9 July 2003, and D. McKittrick, S. Kelters, B. Feeney, and C. Thornton, *Lost Lives* (1999) 52-5.

8 See S. Greer, 'Military Intervention in Civil Disturbances: The Legal Basis Reconsidered' (1983) *Public Law* 573, and A.W.B. Simpson, *Human Rights and the End of Empire* (2001) 58-90.

9 For non-legal accounts see n. 7 above. An incisive but limited account of the importance of the curfew can be found in C. Palley, 'The Evolution, Disintegration and Possible Reconstruction of the Northern Ireland Constitution' (1972) 1 *Anglo-American Law Rev.* 368, at 412-14.

scale. In short, this was the closest any part of the state came to a form of martial law since the Irish Troubles of the 1920s.

In contrast to Bloody Sunday and Internment, the Falls curfew led to no litigation in the superior courts, to no official inquiries, and to no inter-state European cases. Apart from one (unreported) magistrate's ruling that validated its imposition in traditional common law terms,¹⁰ the curfew left few legal traces. It therefore remained largely invisible to doctrinal legal analyses focusing on the rulings of inquiries or courts of record. Nor were alternative legal sources accessible: primary material remained barred under the thirty-year rule, and socio-legal studies of Northern Ireland emergency powers (pioneered variously by Boyle, Hadden, Hillyard, and Walsh) began only later.¹¹ Only now can the legal status of the curfew be properly examined, by reference to the recently released archive material from Ministry of Defence (MOD) and intelligence sources, from the records of curfew trials,¹² and from the deliberations of the Cabinet of the devolved Northern Ireland (Stormont) government.¹³

The most immediately compelling reason for re-examining the curfew lies in the critique it offers of the easy assumptions which seem to underpin some thinking in relation to the 'war on terrorism'. But there are also related reasons arising specifically from the Northern Ireland peace process. Learning the lessons from a violent past, if only to avoid a recrudescence of violence in the future, is increasingly recognized as a critically important part of the transitional process.¹⁴ This is particularly so in the face of the

- 10 'Gen. Freeland's Curfew Order Was Right, Rules City Magistrate' *Belfast Telegraph*, 8 September 1970.
- 11 See K. Boyle, T. Hadden, and P. Hillyard, *Law and State: The Case of Northern Ireland* (1975); K. Boyle, T. Hadden, and P. Hillyard, *Ten Years on in Northern Ireland: The Legal Control of Political Violence* (1980); and D. Walsh, *The Use and Abuse of Emergency Legislation in Northern Ireland* (1983). On the Diplock courts see, also, G. Hogan and C. Walker, *Political Violence and the Law in Ireland* (1989) 101–37 and Lord Diplock, 'Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland' (1972; Cmnd. 5185) (the Diplock report).
- 12 The files are located at the Public Record Office Northern Ireland (PRONI), file refs: BELF/1/1/2/231/1, BELF/1/1/2/231/16, BELF/1/1/2/231/17, BELF/1/1/2/232/1, BELF/1/1/2/232/18, BELF/1/1/2/232/31, BELF/1/1/2/233/12, BELF/1/1/2/233/13, BELF/1/1/2/233/24, BELF/1/1/2/233/28, BELF/1/1/2/233/29, BELF/1/1/2/233/31, BELF/1/1/2/233/32, BELF/1/1/2/233/33, BELF/1/1/2/233/34, BELF/1/1/2/233/35, BELF/1/1/2/233/36, BELF/1/1/2/233/37, and BELF/1/1/2/233/39.
- 13 A devolved government under the *Government of Ireland Act 1920* ruled Northern Ireland from 1921 to 1972. It is often referred to as the 'Stormont Government' because of the geographical location of the devolved Northern Ireland institutions. See P. Buckland, *The Factory of Grievances: Devolved Government in Northern Ireland* (1979).
- 14 See, generally, R. Teitel, *Transitional Justice* (2000). On the specifics of the Northern Ireland situation, see C. Bell, *Peace Agreements and Human Rights* (2000) and C. Campbell, F. Ni Aoláin, and C. Harvey, 'The Frontiers of Legal Analysis: Reframing the Transition in Northern Ireland' (2003) 66 *Modern Law Rev.* 317.

kind of strategies of official denial that were evident in relation to the curfew, where Parliament was informed that there was 'no formal curfew'.¹⁵ Thus, learning the appropriate lessons from the period represented by the curfew is critically important both locally and globally.

Part one sets the scene for an evaluation of the curfew experience by an exploration of the relationship between law, legitimacy, and the role of the military in democracies experiencing violent conflict. This is followed by an examination of non-statutory theories of military intervention, with particular reference to MOD analyses of the eruption of the Troubles. The discussion explores civil and military perceptions of the law governing military deployment, and poses questions about the acceptability of the actions taken within a framework of democratic governance.

Part two examines the operationalization of the law on military intervention during the curfew, drawing on archival material and employing empirical studies developed from the socio-legal studies mentioned above (see Addendum). By surveying the trials on indictment arising from the curfew, a picture is given of the operation of emergency powers in 1970, from the curfew's inception through to follow-up criminal legal proceedings. For comparative purposes, a contemporaneous set of non-curfew Troubles-related cases is included where appropriate. The discussion explores police and army interaction in the exercise of emergency powers; it critically examines the attempt to achieve a tie-in between the army operations and the ordinary court system; and it investigates the legal and the administrative dimensions of the problematic civil-military relationship highlighted by the curfew.

Part three draws overall conclusions, relating the contribution that the curfew made to the escalation of the conflict to its operational aspects and legal underpinnings. Failings are identified, and some general lessons drawn out about the dangers of a 'war' model in complex and violent political disorders.

PART I. EMERGENCY, DEMOCRACY, AND THE MILITARY

In the liberal-democratic state, military intervention in civil affairs is the exception. Conceptually therefore, debate is located firmly on the terrain of 'emergency powers', with political science and related legal analyses typically focusing on normative ('ought') questions, and sociological and socio-legal analyses attempting to describe what actually happens to law and legal legitimacy during emergencies ('is' questions).

The 'ought' questions generated by the juxtaposition of democracy and emergency have related to the tension between the preservation of the

15 The denial is examined further below.

(democratic) state, and the protection of individual human rights.¹⁶ Some have focused on the need to uphold constitutional provisions during emergency. Others have sought to prioritize the upholding of the democratic principles underpinning the constitution rather than the strict letter of the constitution itself.¹⁷ All these discourses, however, locate the ultimate justification for emergency powers in the need to preserve democracy. The questions of the end-goal and the means by which that goal is to be achieved are related. While not all democratic theorists insist that responses to emergency be in strict accordance with pre-existing constitutional and legal norms, there is general agreement on the need to ensure that any actions taken are within a framework of governance in which administrative norms ensure ultimate accountability to a democratically-elected government.¹⁸ Thus while there is a lack of agreement as to what role legal norms should actively play,¹⁹ there has been no support for a view that law should create a locus of power during the emergency which serves as a non-democratic substitute for elected government.²⁰

In an emergency, the institutions of the state in relation to which the need for democratic control is likely to be most pressing are its security forces. The determination of the modes of behaviour which these forces are permitted to adopt in times of crisis will inevitably involve an extrapolation from those deeply ingrained modes applicable in ordinary times. In the case of the police, this can be a relatively straightforward extrapolation from the ordinary division of labour within the criminal justice system (though this may mask more profound changes). The Army is significantly more problematic, since employment of the military to deal with civil disorder is not a seamless extension of its ordinary role, but a radical departure. Structures of accountability and control even proximately appropriate to the new situation cannot be assumed to exist.²¹

16 See J. Fitzpatrick, *The International System for Protecting Rights During States of Emergency* (1994) and J. Oraá, *Human Rights in States of Emergency in International Law* (1992).

17 For an argument along these lines, see J.E. Finn, *Constitutions in Crisis: Political Violence and the Rule of Law* (1991).

18 Schlesinger, while acknowledging that emergency government was an 'extra-ordinary resort to raw political power, necessary but not lawful', nevertheless envisaged this action as one taken by the democratically elected president, not an autogenous military one. See A.M. Schlesinger, *The Imperial Presidency* (1974) 16.

19 See O. Gross, 'Chaos and Rules: Should All Responses to Violent Crises Be Constitutional?' (2003) 112 *Yale Law J.* 1011. The consequences of a retreat from legality during emergency are explored further below.

20 This is a separate issue from the legitimate delegation of powers by the democratic government during the emergency. Even the 'dictator' model of emergency government from the Roman republic as analysed by Carl Friedrich envisaged that the appointment of the (temporary) dictator take place 'according to precise constitutional forms'. See C.J. Friedrich, *Constitutional Government and Democracy* (1950) 574, quoted in Finn, *op. cit.*, n. 17, p. 16.

21 See A. Babington, *Military Intervention in Britain: From the Gordon Riots to the Gibraltar Incident* (1990) 242, and Greer, *op. cit.*, n. 8.

By virtue of its primary function, military thinking tends to operate according to a 'war' model, with a rhetoric of 'battles', 'enemies', and 'control of territory'. Such a mind-set poses immediate legal challenges when applied to civil disorder, political violence, and terrorism. What legal encapsulation is appropriate: martial law, civil law, or perhaps some kind of hybrid constructed around a recasting of the civil law according to military requirements?²² How are the police and Army to interact in the exercise of the legal powers available to them? How are the Army's actions to relate to the operation of the criminal justice system? And are the legal imperatives driving the Army's actions compatible with ultimate control by a democratically elected government?

In a democracy, the issues thereby raised may themselves be central to the conflict. For its supporters, the legitimacy of the state's action is, in a normative (political) sense, axiomatic.²³ But in a socio-legal sense (the 'is' question), popular legitimacy in situations of political upheaval is not given or fixed; rather, it is fluid and contested – there is a 'struggle for legitimacy'²⁴ in which law typically plays an important role. For the state, the appeal of legal form is the obvious one encapsulated in the phrase 'what is lawful is legitimate'. In practice, legality may not always be a guarantee of perceived legitimacy, but an absence of legality will almost certainly be appealed to as proof of the illegitimacy of a particular course of action.

The legitimacy attaching to legality is likely to be highest where the state is seen to adhere closely to concepts of the rule of law, or in Weberian terms, to 'formal rationality'.²⁵ Yet, within the state apparatus, the pressures of the conflict inevitably produce demands for the loosening of the restrictions imposed by adherence to the rule of law, leading to potentially abrasive security strategies. Amongst those upon whom these strategies impact, perceptions of the legitimacy of the state's actions are likely to be affected by gaps between the rhetoric of the liberal-democratic state and the actions of its agencies (typically the army and the police). It can be significantly delegitimizing for a democratic state faced with political violence and terrorism to depart markedly from rule-of-law standards, since its self-

22 For military-based explorations of some of these issues see F. Kitson, *Low Intensity Operations: Subversion, Insurgency, Peace-Keeping* (1971); R. Clutterbuck, *Protest and the Urban Guerrilla* (1973); R. Eveleigh, *Peacekeeping in a Democratic Society, the Lessons of Northern Ireland* (1978); and M. Addison, *Violent Politics: Strategies of Internal Conflict* (2002) 244.

23 For a discussion of this point in a Northern Ireland context, see K. McEvoy and B. Gormally, '“Seeing” is Believing: Positivist Terrorology, Peacemaking Criminology and the Northern Ireland Peace Process' (1997) 8 *Critical Crim.* 9.

24 Boyle et al., op. cit. (1980), n. 11, p. 93. See, also, K. McEvoy, *Paramilitary Imprisonment in Northern Ireland: Resistance Management and Release* (2001) 137.

25 For a discussion of Weber's view of formal rationality in the context of legal responses to United States race riots, see I. Balbus, *The Dialectic of Legal Repression: Black Rebels Before the American Courts* (1977) 3.

definition may depend to a large extent on the contra-distinction between the democratic, law-upholding 'us,' and the undemocratic, violent 'other/terrorist'. Describing the United States response to race riots in the 1960s, Balbus describes a similar dynamic:

the immediate pressures to end the violence unavoidably dictate the serious abrogations of the principle of formal rationality and hence precisely the risk of delegitimation and maximization of revolutionary potential.²⁶

In violent political conflict, therefore, law occupies a somewhat ambivalent position. The legitimating aspect of its formal rationality is clear, but for groups affected by repressive strategies, the legal failings of the state provide an obvious point of attack. For such groups, trials may offer a route to expose these failings. Thus law can display an important 'resistant' potential, even (or perhaps especially) in situations of significant legal repression.²⁷ In a democracy, law is not 'outside' the conflict; rather, it provides one site on which the conflict can be conducted, and is thus partly constitutive of it.

1. *United Kingdom legal frameworks*²⁸

In the United Kingdom, the legal framework governing military intervention lies, for the most part, in non-statutory sources, established well in advance of contemporary theories of democratic accountability. Thus Evelegh, a former Battalion commander in Belfast, found it:

startling to reflect that, in strict constitutional theory, a corporal, with ten privates in a lorry, who happened to drive through Grosvenor Square in London when a crowd of demonstrators had burst through a police cordon and was attacking an embassy, would have not merely a right to intervene and suppress the disorder with lethal weapons if necessary, but an absolute duty to do so, in spite of anyone from the Prime Minister to the senior policeman on the spot telling him not to.²⁹

This formulation, (though contestable), highlights critical problems left by the unfinished business of the seventeenth-century constitutional settlement:

26 *id.*, p. 3. For an exploration of Balbus's theories in a Northern Ireland context, see P. Hillyard and K. Boyle, 'The Diplock Court Strategy: Some Reflections on Law and the Politics of Law' in *Power, Conflict and Inequality*, eds. M. Kelly, L. O'Dowd, J. Wickham (1982).

27 For a discussion of the resistant quality of law in the Northern Ireland context, see K. McEvoy, 'Law, Struggle, and Political Transformation in Northern Ireland' (2000) 27 *J. of Law and Society* 542. More generally, see R. Abel, *Politics by Other Means: Law in the Struggle Against Apartheid 1980–1994* (1995); D. Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (1991); and O. Kirchheimer, *Political Justice* (1961).

28 For a fuller discussion of the points raised under this heading, see Greer, *op. cit.*, n. 8; Simpson, *op. cit.*, n. 8, pp. 58–64, and C. Campbell, *Emergency Law in Ireland, 1918–1925* (1994) 123–48.

29 Evelegh, *op. cit.* n. 22, p. 8.

to what extent did developing democratic norms of parliamentary supremacy and constitutional government place limits on non-statutory powers in the sphere of public order? Or more prosaically: did the elected government always control the Army?

That settlement is generally taken to have rendered obsolete a prerogative to enforce martial law within the state, at least in time of peace. Consonant with this view, the twentieth century saw the triumph of statutory over prerogative powers in other areas of emergency provision.³⁰ But as prerogative powers went into decline, a parallel ‘common law’ doctrine arose in response to unrest in the wake of the industrial revolution. This doctrine seemed less a code for military behaviour than a legal rationalization of the use of force which fell outside the positive aspects of the seventeenth-century settlement. The doctrine found its most eloquent champion in A.V. Dicey for whom the law in relation to riot and insurrection was merely an expression of the common law right ‘to repel force by force’, a right which was also a ‘legal duty’ resting on ‘every subject whether a civilian or a soldier’.³¹ For Dicey, one formulation governed everything from the initial deployment of the military (the first part of the doctrine), to the action taken (the second part), whether that be the suppression of riots or the imposition of martial law (one could shade into the other). Thus Dicey’s formulation recreated many of the problems that the seventeenth century was taken to have solved: the Army now appeared to have a mandate for extensive action in situations of emergency, without the need for parliamentary approval, and with questionable regard to the wishes of the elected government.

Attempts to draw upon this muddled doctrinal pool proved disastrous in Amritsar (1919) and in Ireland (1920–21), and thereafter the legal framework of overseas counter-insurgency operations became an exclusively statutory one. This switch, and the increasing reach of democratic constitutional norms prompted some to proclaim Dicey’s demise, but he nevertheless retained a powerful hold on military doctrine. The 1969 *Manual of Military Law* (the Army’s legal bible), for instance, insisted that in the case of a conflict between the civil and military authorities as to the appropriate response to a public order crisis:

Even though the civil authority should given direction to the contrary the commander of the troops, if it is really necessary, is bound to take such action as the circumstances demand.³²

30 *AG v. De Keyser’s Royal Hotel Ltd.* [1920] A.C. 508, followed in Ireland in *Egan v. Macready* [1921] 1 I.R. 265.

31 A.V. Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (1885) 295–6.

32 *Manual of Military Law* (1969) 502.

2. Northern Ireland intervention

In 1966, in response to the heightening tension in Northern Ireland, the Northern Ireland and Westminster governments agreed that the deployment of troops would, if at all practicable, be subject to prior inter-governmental consultation.³³ In 1968, the more pressing possibility of the Army's being deployed prompted a fresh examination of the legal basis for intervention. The core problem as viewed by the Secretary of State for Defence lay in a clash between legal and administrative norms; specifically, there was a mismatch between the MOD's (and the Secretary's) administrative jurisdiction over the Army (the channel for democratic accountability and control), and the legal doctrine giving the military an independent power to intervene in situations of civil disturbance. The issue therefore concretized the problem adverted to earlier: that of a legal doctrine creating a locus of power which could substitute for that of the democratic government.

The Army's solution had been to signal the GOC Northern Ireland (NI), reminding him of the 'great political sensitivity' of the question, and stressing 'the importance of referring to the MOD(A) if humanly possible before, repeat before, acceding to any request for the use of troops in aid of the civil power'.³⁴ The Secretary of State remained concerned. As the Attorney-General, whom he consulted, put it:

you see a dilemma in that the troops in Northern Ireland are responsible to you and through you to Parliament here, but that in this respect you are helpless to control them because they are under an independent duty to assist in the maintenance of law and order.³⁵

The responses to the problem posed by the Secretary of State by both the Army and the Attorney General located the discussion firmly within the common law as analysed in the *Manual of Military Law*. Both focused mainly on the question of the initial stages of deployment, with only limited comment on subsequent action. On the question of 'safeguards',³⁶ the view of the Chief of the General Staff was that the issue was adequately addressed in the requirement that that the GOC refer to the MOD if 'humanly possible'.

The Attorney-General showed a greater incisiveness on the issue of independence, asserting that:

33 *Violence and Civil Disturbances in Northern Ireland in 1969*, Report of a Tribunal of Inquiry (1972; Cmnd. 566; chair, Mr Justice Scarman) para. 20.1 (the Scarman report).

34 MOD Signal Message Form, MOD(Army) [from CGS] to NORIRELAND [to GOC], 6 December 1968, DEFE 24/882 PRONI.

35 Attorney-General to Secretary of State for Defence, 13 December 1968, DEFE 24/882, PRO Kew.

36 'Military Aid to the Civil Power in Northern Ireland', Chief of the Defence Staff to Secretary of State, 9 December 1968, DEFE 24/882 PRO Kew.

the military are bound to assist the civil authorities in the enforcement of law and order ... certainly whenever they are called upon to do so and in circumstances of real and urgent necessity even though they are not called upon to do so.³⁷

But like the Chief of the General Staff, he found the arrangements for military intervention acceptable. Each suggested variously that the law made it 'wrong'³⁸ or 'open to question'³⁹ for instructions to be given absolutely forbidding commanders to take action except on authority from the MOD. And both repeated the common law formulation that the test to be applied in judging the force used by the military was that it be 'reasonable' in the circumstances, with the Chief of the General Staff alone drawing attention to the Army Department's 'general instructions on Internal Security in the United Kingdom'⁴⁰ (the detailed contents of which were not disclosed). When the question was again addressed intergovernmentally in 1969, the Northern Ireland government's view was that:

it was made clear that the GOC should only consider this question [intervention] after consultation with London and again it was understood that there would be consultation at government level.⁴¹

In practice, this is what happened when the troops were deployed in August 1969.⁴²

At this point the doctrinal issue seems to have been allowed to rest. The focus had been almost exclusively on initial deployment (the first part of the common law doctrine), leaving the second part (action to be taken), pointedly neglected. The position, therefore, in the lead-in to the curfew was that the Secretary of State should have been aware of the common law view that an open-ended legal mandate for independent action remained available to the Army. But whereas identification of the problem in relation to initial military deployment had led to compensatory administrative safeguards being imposed, no corresponding post-deployment checks existed.

The problem was complicated by the radical and highly confused fragmentation of political and legal authority brought by the maintenance of the Stormont government after the troops' arrival. At the start of the conflict it was the Home Office rather than the MOD that had the greater role in Northern Ireland policy, though it was to the MOD that the military was administratively responsible. The Army viewed itself as having a simultaneous responsibility under the common law; and for as long as the devolved government at Stormont remained in existence, the Army was

37 'Military Aid to the Civil Authority in Northern Ireland', Attorney-General to Secretary of State for Defence, 13 December 1968, DEFE 24/882 PRO Kew.

38 *id.*

39 DEFE 24/882 PRO Kew, *op. cit.*, n. 36.

40 *id.*

41 Scarman, *op. cit.*, n. 33, para. 20.1.

42 See Greer, *op. cit.*, n. 8, pp. 587–8, and Scarman, *id.*, paras. 24.1–24.3.

required to interact constructively with it. Although Stormont had no direct control over the military, it was its emergency legislation in the shape of the Civil Authorities (Special Powers) Acts (Northern Ireland) 1922–1943 and regulations ('the Special Powers regulations') that provided the bulk of the Army's statutory powers. The Royal Ulster Constabulary (RUC) remained under the Stormont framework, though operationally it was increasingly subordinated to the military. In an attempt at institutional integration, the GOC(NI), was given 'overall responsibility for security operations'⁴³ (under the title of 'Director of Operations'), and a Joint Security Committee was established, consisting of the GOC(NI), the RUC, and representatives of the two governments. Unsurprisingly, though, problems remained; the rationalization which these changes entailed was organizational only, leaving common law imperatives unaddressed, either legally or administratively.

PART II. OPERATIONALIZING THE CURFEW

The weekend preceding the curfew had been unusually violent. In response, the Joint Security Committee warned of tough action. Its private deliberations reveal the breadth of options reviewed: the view of the GOC(NI) was that that 'Martial Law was not for consideration at this stage',⁴⁴ and while restrictions on movement were discussed, there was agreement that 'it would be impossible to impose an absolute curfew'.⁴⁵ The Stormont government considered the question of imposing a statutory curfew (as permitted by Special Powers regulation 19), but the Cabinet conclusions record that 'imposition of a limited curfew would not be possible under existing powers'.⁴⁶ This formulation apparently reflected the view that a full-blown curfew was too extreme a step, and a lesser restriction legally impermissible. Nevertheless, without relying upon the Special Powers regulation, on Friday 3 July, as street disturbances following a house search in the Lower Falls escalated, the Army imposed a complete curfew on the area.

The use of the word 'curfew' is important. In Parliament a few days later, it was claimed on behalf of the MOD that:

No formal curfew was imposed . . . Restrictions on movement were imposed in the interests of the safety of the population as a whole and to restrict the operations of armed criminals.⁴⁷

43 See 'Northern Ireland, Text of a Communiqué and Declaration issued after a meeting Held at 10 Downing Street on 19 August 1969' (1969; Cmnd 4154).

44 Conclusions of a Meeting of the Joint Security Committee, 28 June 1970, DEFE 13/730 PRO Kew.

45 *id.*

46 Cabinet Conclusions 28 June 1970, CAB4/1530 PRONI.

47 803 *H.C. Debs.*, col. 329 (6 July 1970).

But the Army's situation report for the day ('SITREP') records that 'at 2200 hrs curfew orders were issued for the Falls Area, this curfew to remain until further orders'.⁴⁸ The SITREP for the following day likewise records that 'the curfew has continued'.⁴⁹ The location is also of importance: the Lower Falls was dominated by the quiescent 'Official IRA' (as distinct from the more militant 'Provisional IRA'), and this in itself suggests a significant intelligence failure, or more likely a miscalculation.⁵⁰ While the formal justification for the curfew lay in the rioting which grew out of the house search, there are indications that the military was preparing for an encounter with the IRA.⁵¹

The curfew was an innovation in terms of the tactics then in use by the Army in Northern Ireland, though it was not without precedent. Curfews had been imposed under Special Powers regulations until the 1950s,⁵² and statutory curfews had been employed in Cyprus (1950s)⁵³ and in Aden (1960s).⁵⁴ What was unique about the Falls curfew was the absence of a statutory basis, raising the question of who authorized it. The SITREP's reference to 'curfew orders'⁵⁵ strongly suggests that the decision was not made by local troops, and points towards the Director of Operations/GOC(NI).

At a meeting of the Joint Security Committee held the morning after the imposition of the curfew, the GOC(NI) made no mention of having obtained permission from, nor of even having consulted either Stormont or Westminster in relation to actions taken during 'last night's "battle"'.⁵⁶ As regards legal aspects, the committee's conclusions record that:

the advisability of legalising the 'curfew' ... by an Order under the Special Powers Act ... were considered. Decision deferred for consideration by legal experts ...⁵⁷

In a message to the MOD on 6 July, the GOC(NI) did not claim that the troops had acted without his authorization, nor that he had received permission from the MOD, the Home Secretary or Stormont. Instead, his main concern was to defend the troops against allegations of brutality and theft (of which there were many). The language employed again displayed a

48 DEFE 25/273 PRO Kew.

49 id.

50 See Hamill, op. cit., n. 7, p. 38. An account by the GOC showing awareness shortly after that the area was Official IRA-dominated can be found at DEFE 25/273 PRO Kew. On the IRA generally, see R. English, *Armed Struggle: A History of the IRA* (2003).

51 See Hamill, id., p. 37.

52 L.K. Donohue, *Counter-terrorist Law and Emergency Powers in the United Kingdom, 1922-2000* (2001) 63.

53 Simpson, op. cit., n. 8, p. 898.

54 See P. Taylor, *Brits: the War Against the IRA* (2001) 30-2, 50.

55 Authors' emphasis.

56 Conclusions of a Meeting of the Joint Security Committee, 4 July 1970, DEFE 13/730 PRO Kew.

57 id.

soldier's determination to locate events using classic military reference points: 'This was not an elaborately pre-planned cordon/curfew/search exercise. It was a battle.'⁵⁸

At the first Stormont Cabinet meeting following the curfew, the account given by the Minister for Home Affairs, while celebratory, hinted at the question mark over the legality of the action, and made no claim of prior consultation:

to have announced a formal curfew would have required the making of an Order which would have applied only from late on the Saturday (4 July), thus highlighting the situation and possibly giving rise to the questions of the validity of the measures already taken. It had therefore been decided to act under the Special Powers legislation and the common law.⁵⁹

The reference to the possible 'making of an Order' can be taken as a reference to regulation 19. On the critical issue of decision-making, the Minister noticeably employed the passive tense, thereby obfuscating the question of responsibility. But the suggestion that action by his Ministry could only have been taken retrospectively, clearly implies that measures were taken without his involvement.

The matter was apparently deemed insufficiently serious to make it onto the agenda of Westminster cabinet discussions,⁶⁰ but such operations were discussed at a meeting of the Committee on Northern Ireland on 13 July.⁶¹ Acting upon the committee's decision, the MOD's response was to insist on prior approval for future major operations, implying that approval had not been sought (or granted) in the past.⁶² The best view therefore, was that the decision to impose the curfew as an act of will of the GOC.⁶³

1. *Programmatic aspects: searches and arrests*

As regards the actual conduct of military operations, apart from the fire-fights, the curfew seems to have involved four main elements. There was a prohibition on entry into and exit from the curfew area, the boundaries of which were initially unclear;⁶⁴ within the area, people were required to clear

58 DEFE 25/273 Kew.

59 Cabinet conclusions 7 July 1970, CAB4/1532 PRONI.

60 Cabinet conclusions 29 June 1970, CAB 128/47, PRO Kew, and cabinet conclusions 7 July 1970, CAB 128/47, PRO Kew.

61 The Ministerial Committee on Northern Ireland was established by Ted Heath on taking office in 1970. See P. Hennessy, *The Prime Minister – The Office and Its Holders Since 1945* (2001) 347.

62 MOD Signal Message Form, from MOD UK Army to HQ Noireland 14 July 1970, DEFE 25/273, Johnston to PS/Minister for Defence 15 July 1970, DEFE 25/273, and MOD Signal Message Form, from MOD (Army) To Noireland 15 July 1970, PRO Kew.

63 This view is supported in Hamill, *op. cit.*, n. 7, p. 37, and Barzilay, *op. cit.*, n. 7, p. 14.

64 Thus the journalist Tony Geraghty escaped conviction because he could show he was arrested outside the strict curfew area. See 'Newsmen in Curfew Case Cleared' *Irish News*, 28 July 1970.

the streets (this ended the rioting within a few hours) and there was a complete prohibition on movement; mass house searches were initiated; and there were widespread arrests. The restrictions were temporarily lifted to permit shopping for food for two hours on Saturday afternoon (movement was permitted only within the curfew area), and again on Sunday morning to allow church attendance. The curfew collapsed (embarrassingly for the Army) on Sunday afternoon when women from outside the curfew area marched into the restricted zone carrying bread and milk.⁶⁵

The house searches had begun with the imposition of the curfew and continued throughout the night, with considerable amounts of arms found as gun battles raged. MOD papers disclose that whereas 'certificates of search' were produced for later searches, 'none had been issued while the initial battle was taking place'.⁶⁶ This is significant in that it suggests that if any legal basis could be found for these early searches, it would have to be in the common law.

With the searches came extensive arrests, all carried out by the Army (see Table 1). Some related to arms finds, while others were for simple breaches of the curfew. This sole reliance upon the Army contrasts sharply with the position in non-curfew cases from 1970 where, as the data from the court survey reveals, 40 per cent of arrests were carried out by RUC officers acting alone. Further analysis of arrest patterns in non-curfew cases discloses important differences between the treatment of loyalist and republicans. Most republicans were arrested either in Army or joint Army-RUC operations, while as many loyalists were arrested by the RUC as by the Army. This suggests that the RUC was able to act independently only in loyalist districts. While the small numbers involved in the non-curfew cases means that extreme caution in analysis is required, the pattern nevertheless prefigures the differential impact of security force activity in the mid-1970s reported by Boyle et al. What appears to emerge is an early example of an institutional bifurcation whereby nationalist areas became subject to military control mechanisms (the 'military-security approach'),⁶⁷ whereas in loyalist areas, police-led approaches dominated.

Reflecting the frenzied nature of activity in the curfew's first ten hours, 59 per cent of arrests took place from 4–8 a.m. (see Table 2). In terms of location, the largest category of arrests came under the 'other scene of crime' heading (63 per cent). These generally involved individuals arrested at other peoples' homes at which a weapon was found during what seemed to be blanket street searches. As will be seen below, this *modus operandi* was directly linked to the flaws that later emerged in prosecution strategy.

65 On the ending of the curfew see Taylor, *op. cit.*, n. 54, p. 50, and S. Pickering, *Women, Policing and Resistance in Northern Ireland* (2002) 74.

66 'Northern Ireland Meeting Between Home Secretary and Defence Secretary, July 1970, DEFE 25/273, PRO Kew.

67 Boyle, *op. cit.* (1975), n. 11, p. 43.

Table 1: Who Made the Arrests?¹

Curfew Cases	<i>Arrestor</i> RUC alone		Joint Army/RUC		Army alone		Other		Not known		Total	
	Count	Row %	Count	Row %	Count	Row %	Count	Row %	Count	Row %	Count	Col %
<i>Background of Defendant</i> (All Republican)	0		0		41		0		0		41	100%
Total	0	0%	0	0%	41	100%	0	0%	0	0%	41	100%
Non-Curfew Cases	<i>Arrestor</i> RUC alone		Joint Army/RUC		Army alone		Other		Not known		Total	
	Count	Row %	Count	Row %	Count	Row %	Count	Row %	Count	Row %	Count	Col %
Loyalist	5		0		5		0		1		11	73%
Republican	1		1		2		0		0		4	27%
Total	6	40%	1	7%	7	47%	0	0%	1	7%	15	100%

¹ The data has been presented to as to make it accessible as possible. For comparative purposes 'Curfew Cases' and 'Non-Curfew Cases' have been grouped separately within tables. In all instances a line has been used to separate totals from raw data. The figures appearing below the horizontal line represents the totals and corresponding % figures for each of the heads of data listed horizontal across the page. Thus in this table in the 'Non-Curfew Cases' the figures displayed as 'Total' below the horizontal line show that 6 arrests were carried out by the RUC alone and that this amounted to 40% of the total listed at the end of line 15 (100%). The figures appearing to the right of the vertical line represents the totals and corresponding % figures for each of the heads listed vertically down the page. Thus in the figures displayed as 'Total' to the right of the vertical line show that 11 of the defendants were loyalists and that these constituted 73% of the total listed at the end of the line of 15 (100%). On the use of SPSS in generating these tables see 'Addendum'.

Table 2 Where and When Were the Arrests?

Curfew Cases

<i>Location of First Arrest</i>	<i>Time of First Arrest</i>												<i>Total</i>	
	00–04		04–08		08–12		16–20		20–24		Not known		Count	Col %
	Count	Row %	Count	Row %	Count	Row %	Count	Row %	Count	Row %	Count	Row %		
Home	0		7		3		0		0		0		10	24%
Street	1		2		0		0		1		0		4	10%
Custody	0		0		1		0		0		0		1	2%
Elsewhere	0		0		0		0		0		0		0	0%
Other scene of crime	0		15		11		0		0		0		26	63%
Total	1	2%	24	59%	15	37%	0	0%	1	2%	0	0%	41	100%

2. *Detainee profiles*

The profile of detainees is important in clarifying the breadth of impact of the sharper end of curfew operations, and therefore in helping to explain its overall depth. The available information on curfew detainees (all in the sample were male), reveals that at least 40 per cent were in some kind of skilled employment, and only 10 per cent are known to have been unemployed (see Table 3). Detainee age profile is notable for its spread:⁶⁸ the percentage aged 25 or over is slightly higher than that aged 22 or under. This picture is markedly different from that of Diplock defendants in 1975, of whom around 60 per cent were aged 21 or under.⁶⁹ One interpretation is the counter-intuitive one that those involved in the 1970 violence were older than later participants. But as will be seen, the high acquittal rates in curfew cases, and the circumstances of charging, suggests that many defendants were uninvolved individuals, caught up in events. It is significant that no defendant could be identified as having any kind of criminal record for offences that appeared to be paramilitary-linked. In terms of age, class, and previous convictions, the picture of curfew detainees that emerges is one of a cohort largely representative of males in a Belfast working-class community.

3. *Detention and questioning*

The pattern of interrogation of curfew detainees helps to throw light on the shortcomings of the presentation of evidence given at trial, particularly when the approach in 1970 is contrasted with what later became the norm. The court survey reveals that the vast bulk of curfew detainees (93 per cent) were taken to Springfield Road joint Army-RUC base, where they were subjected to a second (RUC) arrest. This contrasts with non-curfew cases, where, in accordance with ordinary police practice, there was little centralization, with non-curfew detainees held at ten different locations. In a sense this prefigured the switch from 1971 onwards to dedicated interrogation centres.⁷⁰ But it may be wrong to read too much into this as Springfield Road was the local base for the Falls. It probably paints a truer picture not to suggest that the Springfield Road base was deliberately chosen as an early dedicated interrogation centre but, rather, that the imperatives of a large-scale enterprise such as the Falls operation helped to lay an operational print (large number of detainees in a limited number of centres), that was later extensively adopted.

There is little to suggest intensive interrogation of curfew detainees by the RUC. This contrasts sharply with the situation a year later, when

68 It was not always possible to determine precisely when age was assessed, hence the figures here should be regarded only as being accurate to within a few months.

69 Boyle, *op. cit.* (1975), n. 11, table 3.2, p. 23.

70 *id.*, p. 46.

Table 3 Class and Age

Curfew Cases

<i>Class of Defendant</i>	<i>Age of Defendant</i>												<i>Total</i>	
	19 or under		20–22		23–24		25–27		28 plus		Not known		Count	Col %
	Count	Row %	Count	Row %	Count	Row %	Count	Row %	Count	Row %	Count	Row %	Count	Col %
Skilled non manual	1		0		0		1		0		0		2	5%
Skilled manual	2		1		0		1		4		0		8	20%
Partially skilled	1		1		1		0		3		0		6	15%
Unskilled	3		0		0		1		1		0		5	12%
Unemployed	2		1		0		1		0		0		4	10%
Not Known	0		0		0		0		0		16		16	39%
Total	9	22%	3	7%	1	2%	4	10%	8	20%	16	39%	41	100%

following internment some detainees were subjected to sleep and food deprivation, wall-standing, hooding, and 'white noise'.⁷¹ It also contrasts with the situation in the late 1970s and 1980s in which large number of detectives operated in interrogation teams in individual cases. In the case of curfew detainees, the court files reveal a universal pattern of only one RUC detective conducting interrogations. Nor were these detectives engaged in multiple interrogations of individual suspects: in all the curfew cases the detainees were subjected to only one RUC interrogation session, while in non-curfew cases only 13 per cent involved more than one (see Table 4). Only 10 per cent of curfew cases yielded a confession (the figure in non-curfew cases was 13 per cent). But this was not because curfew detainees remained silent: the files indicate that all replied to questions, mostly to explain that on imposition of the curfew they had sought shelter in premises in which a weapon was subsequently found. By later standards the process was not long drawn-out: the files indicate that in 95 per cent of curfew cases the period between first arrest and charging was less than twenty-four hours.

Of course this account of interrogation relates only to RUC practice; it says nothing about Army behaviour other than that the Army did not obtain confessions that were relied upon as evidence. A contemporaneous locally produced report was very critical of the military, claiming that detainees at Springfield Road were 'very roughly used by the troops'.⁷² Notably though, the report makes no claim that Army brutality occurred in the course of interrogations, whether calculated to obtain confessions or operational intelligence (though it might be implied that the aim was to 'soften up' suspects prior to RUC questioning). The question of the purpose of the brutality (if any) is left open.

Whatever the purpose or effect of the Army's behaviour, the overall picture that emerges is far different from the confession-orientated interrogation system that emerged later in the 1970s.⁷³ Prior to the 1973 lowering of the standard for the admissibility of confessions in Diplock cases, interrogations in Northern Ireland remained subject to the 'voluntariness' requirements of the pre-1964 Judges' Rules. A block therefore existed on intensive interrogation, at least if this was geared to producing evidence that would be admissible in court.⁷⁴ There was also an institutional dimension in that in 1970 RUC Special Branch was at nothing like the strength it later achieved (in February it numbered only eleven officers).⁷⁵ In any case, since most indictable curfew prosecutions flowed

71 *Ireland v. UK* 25 Eur. Ct. H.R. (ser. A), 207.

72 CCDC, op. cit., n. 7, p. 16.

73 Walsh, op. cit., n. 11, p. 84.

74 See Diplock, op. cit., n. 11, paras. 73–92 and *R v. Flynn & Leonard* [1972] May N.I.J.B. 112, 131.

75 Some details can be found with Cabinet conclusions 5 February 1970, CAB4/1500 PRONI.

Table 4 Did Interrogations Yield Confessions?

		<i>Number of RUC Interrogation Sessions</i>				Total	
		1		2–3			
<i>Confession</i>	Count	Row %	Count	Row %	Count	Col %	
Written	2		0		2	5%	
Oral	2		0		2	5%	
None	37		0		37	90%	
Total	41	100%	0	0%	41	100%	
		<i>Number of RUC Interrogation Sessions</i>				Total	
		1		2–3			
<i>Confession</i>	Count	Row %	Count	Row %	Count	Col %	
Written	0		2		2	13%	
Oral	0		0		0	0%	
None	13		0		13	87%	
Total	13	87%	2	13%	15	100%	

from arms searches, prosecutors may have assumed that once the suspect could be located at the scene of the find, the evidence spoke for itself, thus rendering confessions unnecessary (though as events transpired this proved a vain hope).

4. *Charges and evidence*

Prior to the institution of the office of the DPP in 1972, virtually all decisions on prosecutions lay with the RUC. Those arrested for simple breach of the curfew order eventually found themselves facing 'impeding' charges under the Criminal Justice (Miscellaneous Provisions) Act 1968.⁷⁶ Thus, breaches of a non-statutory curfew were tried as, and convictions obtained for, statutory offences. As regards indictable offences, the centrality of firearms charges to the prosecution strategy is illustrated by their utilization as the most serious charge in 88 per cent of curfew cases, a much higher figure than in the non-curfew group (33 per cent, see Table 5).⁷⁷

As Walsh has made clear, analysis of the processing of cases from charging through to trial must involve some assessment of the strength of the evidence employed. In assessing this strength, confessions were treated as a separate case, enabling judgement to be made on the extent of prosecution reliance upon them. Apart from confessions, the rule of thumb was that 'strong circumstantial, identification or forensic evidence would amount to substantial evidence'.⁷⁸ Where for instance, five people were detained at a house at which a weapon was found, and all were charged with 'possession', the evidence was deemed strong in the case of an individual or individuals who could be specifically linked to the weapon, but weak if the person(s) could not be so linked.

Application of this standard to the curfew detainees revealed that instances in which there was a confession (written or oral), and other strong evidence amounted to 10 per cent of the curfew total; 39 per cent of cases were based on 'other strong' (non-confession) evidence, but a very high percentage, 51 per cent were based on 'other weak' (non-confession) evidence (see Table 6). In the non-curfew cases, the evidence appeared much stronger; 94 per cent were based upon evidence classified as 'other strong' (non-confession) or as 'written [confession] and other strong'. The remaining 7 per cent involved a written confession and other weak evidence.

76 s. 7(1) provides that 'Any person who (a) assaults, resists or impedes any constable in the execution of his duty or any person acting in aid of such constable . . . shall be guilty of an offence'. See 'Newsman in Curfew Case Cleared' *Irish News*, 28 July 1970.

77 The intricacies of the legislation meant that some offences (involving ammunition and certain types of firearm) were charged under 'explosives legislation', even though they would ordinarily be considered as firearms offences (and are so considered in this study).

78 Walsh, *op. cit.*, n. 11, p. 17.

Table 5 What Were Suspects Charged With?

Curfew Cases

<i>Background of Defendant</i>	<i>Charges (most serious)</i>								<i>Total</i>	
	Firearms		Explosives		Rioting/arson		Other		Count	Col %
(All Republican)	Count	Row %	Count	Row %	Count	Row %	Count	Row %		
	36		0		0		5		41	100%
Total	36	88%	0	0%	0	0%	5	12%	41	100%

Non-Curfew Cases

<i>Background of Defendant</i>	<i>Charges (most serious)</i>								<i>Total</i>	
	Firearms		Explosives		Rioting/arson		Other		Count	Col %
Loyalist	Count	Row %	Count	Row %	Count	Row %	Count	Row %		
	4		2		2		3		11	73%
Republican	1		1		0		2		4	27%
Total	5	33%	3	20%	2	13%	5	33%	15	100%

Table 6 How Strong Was the Evidence?

Curfew Cases

<i>Background of Defendant</i> (All Republican)	<i>Evidence (confession)</i>												Total Count	Col %
	Written and strong other		Oral and strong other		Written and weak other		Oral and weak other		Other strong		Other weak			
	Count	Row %	Count	Row %	Count	Row %	Count	Row %	Count	Row %	Count	Row %		
	2		2		0		0		16		21		41	100%
Total	2	5%	2	5%	0	0%	0	0%	16	39%	21	51%	41	100%

Non-Curfew Cases

<i>Background of Defendant</i>	<i>Evidence (confession)</i>												Total Count	Col %
	Written and strong other		Oral and strong other		Written and weak other		Oral and weak other		Other strong		Other weak			
	Count	Row %	Count	Row %	Count	Row %	Count	Row %	Count	Row %	Count	Row %		
Loyalist	1		0		1		0		9		0		11	73%
All Republican	0		0		0		0		4		0		4	27%
Total	1	7%	0	0%	1	7%	0	0%	13	87%	0	0%	15	100%

Thus, no convictions were based on ‘other weak’ evidence, a state of affairs that corresponds in some respects to that represented by later studies.⁷⁹

This has implications for a debate that has surfaced regularly: the discrimination issue. While in non-curfew cases republicans and loyalists tend to be treated similarly in relation to charging, if the curfew and non-curfew cases are lumped together, quite a different picture emerges: curfew defendants all came from nationalist/republican communities. Viewed in this way, charges were more likely to be brought on the basis of weak evidence in the case of nationalist defendants than in the case of loyalists. This is a direct function of the curfew operation itself – a kind of operation employed only in a nationalist area.

Again this seems to prefigure the analysis of Boyle et al., locating differences in security strategies affecting the two communities in an institutional bifurcation between army/nationalist/internment and RUC/loyalist/prosecution. In 1970, the distinction was less marked as since the cases of suspects from both communities could be disposed of only by prosecution. But the adoption by the RUC at the charging stage of decisions made as a result of the army’s mode of operation in nationalist communities resulted, in the curfew cases, in a systematic difference in treatment.

5. *Trial*

The limitations of available primary data impact upon the assessments which can be made of the conduct of the trial proper of curfew detainees. But, as in previous studies, an accurate assessment of the main thrust of prosecution evidence can be made. The most useful way to analyse this evidence may be to focus on issues that later emerged as centrally important in Diplock trials, comparing and contrasting practice in 1970 (when jury trial still prevailed) with later experience.

A critical issue already highlighted is the much lower reliance upon confessions in 1970. Nor, as the court files reveal, did evidence from civilian witnesses play a large role in the trial of curfew detainees, whether through unavailability, or from fear of, or sympathy with, the defendants. What of forensic evidence, which assumed a more important role in Diplock trials in the 1980s? In order to assess the use made of forensic material in curfew cases, such evidence was broken down into two categories: ‘strong forensic’ and ‘weak forensic’ (see Table 7). The former consisted of evidence that specifically implicated the accused; an example would be the finding of the accused’s fingerprints on a weapon. The latter could be described as ‘technical’ forensic evidence, providing a necessary ingredient for the proof of an offence, but not specifically implicating the accused. An example would be evidence that a firearm was in a useable condition, though not indicating by whom it had been used.

79 *id.*, p. 84.

Table 7 Was Forensic Evidence Used?

Curfew Cases										
<i>Background of Defendant</i>	<i>Evidence (forensic)</i>								<i>Total</i>	
	Strong (Links accused)		Weak (Does not link accused)		None		Not known		Count	Co %
	Count	Row %	Count	Row %	Count	Row %	Count	Row %		
All Republican	0		39		1		1		41	100%
Total	0	0%	39	95%	1	2%	1	2%	41	100%

While weak forensic evidence figured strongly in curfew cases (95 per cent), strong forensic evidence figured not at all. This is a key finding when combined with the dearth of other evidence. The high prevalence of weak forensic evidence is a function of the extensive employment of firearms charges, but the total absence of strong forensic evidence means that in no case did forensic evidence link the accused to the weapon. This state of affairs could, in turn, be said to be a function of the curfew operation, whereby people were ordered off the streets and had to find shelter in whatever empty building they could find. A frequently repeated evidential scenario was that when the army raided a house and found a firearm or ammunition, all those in the dwelling were arrested and subsequently charged with possession of the material. Thus the general picture in the firearms cases (which formed 88 per cent of the curfew group) (Table 5) was that there was nothing to link the accused to the weapon other than their both being in the same premises at the same time.

The typical pattern in jury trials in Northern Ireland in the 1970s was that around 80 to 90 per cent of defendants tended to plead guilty, while 10 to 20 per cent tended to contest.⁸⁰ The high figure of 80 to 90 per cent guilty pleas is taken to reflect the strength of well prepared prosecution cases. About a half of the 10 to 20 per cent who pleaded 'not guilty' tended to be acquitted. Thus, the overall conviction rate including both contested and non-contested cases tended to be around 90 to 95 per cent, and that in contested cases tended to be around 50 per cent. In Diplock courts in the same period, the conviction rate in contested cases tended to be higher.⁸¹

With an overall conviction rate of 87 per cent (once the 'not knowns' are excluded), the non-curfew group appears to approximate roughly with the jury-trial pattern (see Table 8). The curfew detainees though are radically different: the overall conviction rate, excluding 'not knowns', is 38 per cent as against the conventional 95 per cent. Even allowing for the fact that the picture may be skewed by the large number of 'not knowns', this percentage cannot be viewed other than as strikingly low. If all the 'not knowns' were guilty the conviction rate would rise to only 56 per cent, an extremely unlikely event as most of the 'not knowns' were based upon weak evidence.

While the lack of data about the precise number and types of plea means that a detailed analysis of contested cases is impossible, it is obvious that a much higher percentage of the curfew cases than usual was contested, producing an elevated acquittal rate. This was predictable and suggests severe shortcomings in the prosecution strategy. As noted above, analysis of the nature of the evidence in the curfew cases discloses that 51 per cent of prosecutions were based on 'other weak' (non-confession) evidence (see Table 8). Excluding 'unknowns', all of these cases can be said to have resulted in acquittals.

80 See Boyle et al., *op. cit.* (1975), n. 11, p. 63.

81 *id.*, p. 60.

Table 8 Outcomes and Evidence

Curfew Cases

<i>Outcomes</i>	<i>Evidence (confession)</i>												Total		Total Excluding 'Not Known'	
	Written and strong other		Oral and strong other		Written and weak other		Oral and weak other		Other strong		Other weak					
	Count	Row	Count	Row	Count	Row	Count	Row	Count	Row	Count	Row	Count	Col	Count	Col
Not Guilty	0		0		0		0		4		14		18	44%	18	62%
Guilty	0		1		0		0		10		0		11	27%	11	38%
Not Known	2		1		0		0		2		7		12	29%		
Total	2	5%	2	5%	0	0%	0	0%	16	39%	21	51%	41	100%	29	100%

Non-Curfew Cases

<i>Outcomes</i>	<i>Evidence (confession)</i>												Total		Total Excluding 'Not Known'	
	Written and strong other		Oral and strong other		Written and weak other		Oral and weak other		Other strong		Other weak					
	Count	Row	Count	Row	Count	Row	Count	Row	Count	Row	Count	Row	Count	Col	Count	Col
Not Guilty	0		0		0		0		1		0		1	7%	1	13%
Guilty	0		0		0		0		7		0		7	47%	7	87%
Not Known	1		0		1		0		5		0		7	47%		
Total	1	7%	0	0%	1	7%	0	0%	13	87%	0	0%	15	100%	8	100%

The charges that contributed most to this state of affairs were those relating to possession of firearms. Further analysis of the data reveals that in these cases the conviction rate (36 per cent excluding unknowns) was even lower than the overall figure. Most of these cases involved the house-search evidential scenario described above. The discovery of a weapon hidden in a house might be taken to present the prosecutor with a good basis for proceeding against the occupant of the property, but only 24 per cent of defendants in curfew cases were arrested at home (see Table 2). Instead the bulk of arrests came under the 'other scene of crime' heading, which generally meant the house where the weapon was found, and most of these were in the early hours of the morning.

The prosecutorial debacle represented by an overall conviction rate of 38 per cent is therefore not due to chance factors; rather is directly linked to the nature of the initial military operation. The critical element in the causal chain was put in place when the RUC decided on what seems to have been blanket prosecutions of those found in premises in which weapons were discovered. At that point Army and police strategies merged, as the RUC attempted to shoehorn an approximation to the 'military-security' approach into a criminal justice model.

6. *Curfew: the sequel*

In response to the curfew, administrative reforms in mid-July 1970 required MOD approval for future major operations, but their impact, and that of the experience of the curfew on the security apparatus generally, is difficult to determine. Certainly the public messaging at the highest level was one of approval: the GOC(NI) was made a Knight Grand Cross Order of the British Empire in 1971, the year in which he retired.⁸² While the curfew tactic was not repeated, the following years saw a number of large-scale military operations that had even greater negative impact. Recently released papers in relation to the 1971 internment operation display a still fractured decision-making process, though with a partial reversal of institutional emphasis; it is the Stormont government that seems to have been particularly bullish, while significant sections of Army opinion seem to have remained unconvinced about the desirability of the operation.⁸³ At the time of writing, the Saville Inquiry into the Bloody Sunday killings has yet to reach overall conclusions, but the evidence to date paints a picture of divided chains of command, obfuscation, and institutional friction familiar from the curfew period.

Following these debacles, Stormont was prorogued in 1972, thereby producing a degree of institutional rationalization. The strategy of military primacy eventually ended with the introduction of the new policy of

82 *Who Was Who 1971–1980* (1981) 279–80.

83 A.P. Hockaday to PS/S of S, 2 August 1971, CJ4/56 PRO Kew, and UK Rep NI to Home Office, CJ4/56 PRO Kew.

‘criminalization, Ulsterization, and normalization’ in 1977. Administratively, this formally subordinated the military to the police effort, but it is arguable that despite some important judicial rulings, the issue of the *legal* limits of permissible military action remained unresolved throughout the conflict.⁸⁴

PART III. CONCLUSIONS

The Falls curfew is the militarization phase of the Northern Ireland conflict in microcosm. Its multi-faceted problems forcefully challenge claims for the export value of Northern Ireland security practices in the ‘war against terrorism’; indeed, in some respects it throws up a deeper critique, implicitly challenging the core assumption of the ‘war’ model.

1. *Constitutional and legal failings*

The most obvious problem highlighted relates to the United Kingdom’s constitutional framework governing military intervention in conflict situations. The issues can be summarized as: a lack of clarity as to the legal basis for intervention; the democratic deficiency of doctrines seemingly giving the Army a power of intervention without governmental approval, or indeed, in defiance of government; and a mismatch between legal and administrative norms. Perhaps the way to explore the problem is flatly to ask ‘was the curfew lawful?’ Claims for its lawfulness must be based on the continuing validity of either common law or prerogative theories of military intervention, and must further claim that action taken was in accordance with these doctrines. In common law terms, the duration of the curfew and the fact that initial house searches were without statutory basis suggests that the exercise was closer to the martial-law than the riot-control end of Dicey’s scale. Within the internal logic of this discourse, it could be countered forcefully that there was no necessity for the action taken by the military. Or if necessity justified the immediate imposition of restrictions, such measures were lawful only for the short period required either to clear the streets or to permit the Stormont Minister to invoke statutory powers.

The other possibility is that the curfew was an exercise of the prerogative, but this runs into a number of objections. It is not clear that, historically, a prerogative power to impose curfews existed. If it did, then non-statutory and statutory powers (Special Powers regulation 19) existed in the same area. But the Special Powers Act and many of its regulations were derived from

84 *Attorney General for Northern Ireland’s Reference* (No. 1 of 1975) [1977] A.C. 105. See, generally, F. Ni Aoláin, *The Politics of Force: Conflict Management and State Violence in Northern Ireland* (2000).

the Defence of the Realm Acts 1914–20 and their Irish progeny (the Restoration of Order in Ireland Act 1920). Key British and Irish cases relating to this legislation had held that where prerogative and statutory emergency powers existed in the same area the prerogative power was subsumed in the statutory.⁸⁵ Thus, since the curfew had not been imposed under Special Powers regulation 19, it should be considered unlawful. Finally, had there been a legal challenge to the curfew, the superior courts might have taken the opportunity to undermine or expunge such doctrines of independent military action, at least beyond tightly-controlled time-scales, whether common law or prerogative.

The curfew was therefore probably unlawful, at least beyond its first few hours. But this was not the view taken by the Army, nor by the relevant magistrate: the only point that is absolutely clear is that there is no clarity. The legal basis for military intervention was therefore lacking in precision in respect of when the military could deploy (including the question of whose consent was needed), and what it could do after deployment. These failings have implications not only for the United Kingdom, but for many other common-law jurisdictions (such as the United States). The shortcomings of the initial decision on deployment were to some extent mitigated by the subsequent elaboration of administrative norms. But despite an awareness of a general problem in the area, no attempt was made to elaborate appropriate administrative post-deployment norms until after the problem of the curfew had arisen. Even then it is not clear what effect these norms had, either in practical terms, or in terms of the capacity of the administrative to trump the legal.

2. *Institutional failings: fractured command*

The experience serves as a caution against cosy assumptions of the reach of democratic norms; at the very least, the curfew shows that Army internalization of these norms was far from complete. Overall though, British emergency powers in the twentieth century have moved from non-statutory to a statutory basis. If the curfew should therefore be seen as an egregious element in what was otherwise an identifiable trend in relation to emergency powers, the question arises as to why it emerged at that particular juncture. One obvious explanation lies in Northern Ireland's geographical, political, and legal distance from Britain. But this is at best a partial answer, since the even more distant experience of the use of emergency powers, from

85 *AG v. De Keyser's Royal Hotel Ltd.* [1920] A.C. 508, followed in Ireland in *Egan v. Macready* [1921] 1 I.R. 265. See Campbell, *op. cit.*, n. 28, pp. 115, 140–7. Prerogative powers though have a curious resilience: see *R. v. Sec. of State for the Home Department, ex parte Northumbria Police Authority* [1988] 2 W.L.R. 590, and *Council of Civil Service Unions v. Minister for the Civil Service* [1984] 3 All E.R. 935.

Palestine (1930s) to Aden (1960s), was of exclusive reliance upon statutory provision.⁸⁶

A significant part of the explanation must lie in the fracturing of administrative, legal, and political authority in 1970, between the Army, the MOD, the Home Office, Stormont, and the RUC. Viewed in this light, the curfew represented a failing of democratic governance: in an environment characterized by the absence of appropriate controls and by a mismatch between administrative and perceived legal accountability, the Army fell back on an institutional memory of techniques employed in colonial experiences elsewhere, and the common law became a vehicle for their operationalization. And as recent controversy over agent-handling indicates, this problem of divided and dysfunctional Northern Ireland control mechanisms may not have been solved.⁸⁷

3. *Implications of the 'war' model*

Fractured and ineffectual civilian control therefore facilitated a return to primordial military thinking, in which the prime consideration during the curfew became the deployment of sufficient force to guarantee success in the 'battle'. This untrammelled transposition of a military model to a civilian context produced a straightforwardly repressive technique - an extreme version of the 'military-security' approach. The curfew therefore set a pattern; in subsequent years, this institutional memory played out in abusive interrogation techniques and in a cavalier use of lethal force (though in these instances the legal underpinning was somewhat different).

The 'battle/war' model that permeated Army thinking during the curfew brought with it a demand for control of territory, operationalized as indiscriminate restrictions on the civilian population. The lesson here for the 'war on terrorism' is that a sufficiently strong regular military force can always achieve domination of territory in conventional military terms, but such rapidly achievable gains may have a high long-term price. The Army did succeed in ending the rioting within a few hours, and the fire-fights ended within a few more, but the domination achieved by the curfew was inherently indiscriminate, a quality that helps to explain why the operation had such counter-productive effects. At an immediate level, the restrictions bore just as heavily on an entire segment of the nationalist population of Belfast as on the gunmen. Empirical data from the court survey helps to amplify this point. The representativeness of curfew detainees in terms of

86 See Simson, *op. cit.*, n. 8. Also see, generally, C. Townshend, *Britain's Civil Wars: Counterinsurgency in the Twentieth Century* (1986).

87 In 2003 it was claimed that an Army intelligence unit had allowed one of its Agents ('Stakeknife') within the IRA to kill with impunity. This aspect of military operations was not subordinated to the police; indeed some of those killed may have been police agents. See 'Stakeknife Revelations Hurt IRA and Army' *Guardian*, 17 May 2003.

age and class (though not gender), can be considered a function of the indiscriminate nature of the tactic, a quality directly related to its common law underpinning. Mass arrests carried out exclusively by the military, mostly in the early hours of the morning, and mass detentions in a centralized holding centre, must have greatly increased the curfew's shock effect, particularly given allegations of Army brutality. Confirmation from the court survey that all defendants were nationalists, and utilization of the tactic only in a nationalist area, may help to explain the strong sense of communal victimization which was present before, but which solidified early in the Troubles. This sense of victimization is likely to have been intensified by the RUC policy of blanket charging in relation to arms finds evident from the survey. Again, this partiality suggests a broader lesson: the incapacity of primordial military thinking to cope evenhandedly with complex ethnic, or quasi-ethnic conflict.

4. *Collapsing legitimacy*

At a deeper level, the indiscriminate nature of the operation impacted sharply upon the broader 'struggle for legitimacy'.⁸⁸ This was particularly so as contemporary doubts about the legality of the curfew meant that the blanket of formal rationality was almost entirely absent. The result was precisely the kind of delegitimation described by Balbus. In effect, the indiscriminate nature of an operation conducted according to a 'war' model served to erode the bond of consent between the British state (in this instance represented by the Army) and the governed. When this effect was amplified by further military actions in 1971 and 1972, the result was the creation of an environment within the communities most affected by the initiatives, in which political violence and terrorism were either tolerated or supported. Thus, the 'war' model served in no small measure to sow the seeds for the quarter century of violence that followed; in that respect it became a self-fulfilling prophecy.

This is not to paint a simplistic picture of the delegitimizing effect of legal failings. Despite escalating violence, the Northern Ireland situation did not spiral completely out of control, and repression, while significant, was rarely unlimited. There must therefore have been some sort of 'damper' mechanisms, as a closer exploration of the role of law in the immediate aftermath of the curfew may help to illustrate. While the very high acquittal rate of curfew detainees at ultimate trial reinforces the critique of blanket charges, it also points to important differences in the quality of law that emerged from the attempted shoe-horning of a military-security approach into the criminal justice system. The common law, as interpreted by the

88 The CCDC report (op. cit., n. 7), for instance, displayed considerable confusion as to the legal basis of the curfew, locating its condemnation in a discussion of the 'Riot Act', seemingly unaware that the Act in question had been repealed.

Army in the curfew, was straightforwardly repressive. With little or no mediating role, it functioned as a legal vehicle for military control of the civilian population, producing, just the kind of ‘serious abrogations of the principle of formal rationality’ described by Balbus. The same cannot be said of the trials on indictment since the very high percentage of acquittals meant that they functioned as an effective site of contestation of some of the more egregious excesses of the curfew operation. The law therefore displayed a ‘resistant’ quality, which argues against crude instrumentalist attempts to characterize the entire use of law from imposition of the curfew through to trial as straightforwardly repressive. A similar point can be made about the virtual absence of reliance upon confession evidence which the survey reveals. This absence can be directly linked to the limited interrogation regime revealed by the data, which in turn can be considered a function of the strict rules on admissibility of confessions that then applied.

This suggests that in liberal democratic states experiencing conflict, law makes a difference, perhaps insufficient to prevent recourse to a strategy of repression, but capable nonetheless of acting as a damper on repressive technique. In this sense law can be considered as a self-correcting mechanism of the liberal state, if only a partially effective one. The implications for the ‘war against terrorism’ is that where a state opts for a strategy calculated to evade legal accountability (for example, the holding of detainees at Guantanamo Bay beyond the jurisdiction of domestic courts), this damping effect is absent, creating a potential for long-term harm.

5. How not to do things with rules

The overall picture to emerge from exploration of the militarization phase of the Northern Ireland conflict as represented by the Falls curfew is that the security strategies pursued in the region do indeed offer lessons of global significance, but these may not be the lessons suggested in official discourse. The episode highlights the inadequacy of common-law norms in respect of military intervention in conflict situations, and points to divided and inadequate channels of civilian control of the military, amounting to a multi-layered failure of democratic governance. The experience suggests that use of a ‘war’ model in the face of complex public-order problems, political violence, and terrorism risks providing short-term gains at the expense of long-term damage.

However, the curfew experience offers at least one positive lesson: that of the capacity of law to act as a partially self-correcting mechanism when the liberal-democratic state engages in a strategy of repression. But this points to a corollary of critical global importance: where a state elects to follow a counter-terrorist strategy that successfully evades legal accountability, it risks descent into a situation of unmediated repression, continually reinforcing the problem it is purporting to solve.

ADDENDUM: METHODOLOGY

The judicial records relied upon from PRONI consist of the available 'court files' on all the Troubles-related indictments tried in Belfast City Commission in 1970. Following the methodology employed by Boyle, Hadden, Hillyard, and Walsh, the trial of one individual is referred to as a 'case'; several such cases could be tried on one indictment, and in each case the defendant typically faced a number of charges. Of the total of fifty-six cases, forty-one relate to the Falls curfew. For each case, a data sheet collecting such variables as time of arrest, place of arrest, and so on was completed; this information was then coded and cross-tabulations generated using SPSS. In Table 8, 'outcomes' relate to individuals rather than particular charges.